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IN THE

Supreme Court of the United States

TERM No. 201

No. 621

KECO INDUSTRIES, INC., a Corporation Organized and Existing under the Laws of the State of Ohio, 2438 Beekman Street, Cincinnati 14, Ohio,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on March 8, 1960, and its order of October 5, 1960, overruling plaintiff's motion for a rehearing.

OPINION BELOW

The memorandum opinion of the Court of Claims is unreported and is printed in Appendix B hereto (p. 12).

JURISDICTION

The Judgment of the United States Court of Claims was entered on March 18, 1960. Plaintiff was granted 180 days additional time in which to file its motion for a re-hearing. A motion for a re-hearing was filed by plaintiff on September 13, 1960, which motion was overruled by the Court of Claims on October 5, 1960. The Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

The Court of Claims had jurisdiction under 28 U. S. C. 1491.

QUESTION PRESENTED

Has a low bidder for a government contract regarding whose bid an award has been recommended by the Contracting Officer, whose bid has been determined by the Contracting Officer to be the lowest and the best bid and whose bid has been determined by the Contracting Officer to comply with the terms of the invitation to bid, a legal right to recover expenses incurred in the preparation of its bid, when its bid is subsequently discarded as the result of a decision by the Comptroller General which decision is erroneous in law and which decision amounts to an arbitrary and illegal act?

STATUTE INVOLVED

The statute involved is 10 U. S. C. Section 2305. It is printed in Appendix A (p. 11).

STATEMENT OF THE CASE

Keco Industries, Inc., Petitioner, herein, was the low bidder among 15 bids submitted in response to an invitation for bids for certain air conditioners issued by the Contracting Officer, Gadsden Air Force Base, Alabama.

Paragraph X-2 of the Invitation for Bids (Exhibit 2, transcript) provided:

> "Failure of a bidder to have furnished descriptive literature will result in rejection of that bid. However, *the bid will not be rejected if the bidder has previously offered a product which has been previously procured so that additional descriptive literature could not add to the Government's knowledge of the acceptability of the product.* The Contracting Officer will verify that the product previously procured is adequate to meet the requirements of this Invitation for Bids. Upon verification, the requirements for furnishing descriptive literature may be waived as to that bidder." (Emphasis supplied.)

On January 29, 1958, in accordance with said Section X-2 the Contracting Officer wrote to Keco Industries in part as follows (Exhibit 10, transcript):

> "It has now been determined to waive the descriptive literature requirement to your company pursuant to the rights reserved by the Government under provision X-2 of this Invitation to Bid . . . Action is being taken this date to recommend award to your company. . . ."

Subsequently as a result of protests of unsuccessful bidders and in accordance with Armed Services Procurement Regulations 2-407.9, the question was submitted to the Comptroller General as to whether the Contracting Officer had the right to award the contract to Keco under the circumstances. On March 31, 1958 (Exhibit 13, transcript) and again on May 15, 1958 (Exhibit 14, transcript) the Comptroller General ruled that the Contracting Officer had no legal right to accept Keco's bid. Submitting to this ruling, the contract was entered into with another and higher bidder.

Keco Industries, Inc., Petitioner herein, thereafter on September 15, 1958, filed its petition in the United States Court of Claims, alleging the foregoing facts and, in addition, alleging (a) that the above ruling of the Comptroller

General was "in law erroneous, illegal, and so arbitrary as to amount to capriciousness on his part" and (b) that petitioner had expended $44,940.00 in the preparation of its bid and in rendering assistance to the Air Force in evaluation of the bid.

Respondent filed a motion for summary judgment based on the petition and the documents contained in the transcript. The Court of Claims sustained this motion on the sole authority of its decision in *Heyer Products Company, Inc.* v. *The United States*, 135 Ct. Cl. 63, but made no finding as to the correctness of the Comptroller General's determination. Petitioner's motion for a re-hearing was overruled.

REASONS FOR GRANTING THE WRIT

1. Since the Administrative Discretion of the Contracting Officer Was Exhausted, Petitioner Held Legal Rights, from Whose Invasion It May Appeal.

The Court of Claims decision is directly contrary to the decision and philosophy expressed by this Court in *The United States* v. *Purcell Envelope Company*, 249 U. S. 313. In that case, this Court held that when the administrative discretion of a government contracting officer has been exhausted (in that case by the making of an award to the low bidder) rights accrue to the bidder in whose favor the discretion has been exercised and obligations are incurred by the government.

Respondent attempted in the Court of Claims to distinguish the *Purcell Envelope* case on the grounds that an award (though no contract) had been made in that case, whereas in the instant case, the Contracting Officer had "merely" decided to "recommend award" to Petitioner (Exhibit 10, transcript).

In *Purcell Envelope* this Court stated at page 318:

> "There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the bidder as to insist upon its own. And, we repeat, there must be some point at which discretion ceases and obligation takes its place."

Petitioner submits that *a decision of the Comptroller General is not an exercise of administrative discretion.* The administrative discretion of the Air Force reserved to it by 10 U. S. C. A. Section 2305 was exhausted when the Contracting Officer determined to recommend award to Petitioner. This section provides, in part:

> "Awards shall be made . . . to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered."

This determination of the Contracting Officer amounted to a decision that Petitioner was "responsible" and that its bid "conforms to the invitation" and is "most advantageous to the United States." No significant event occurred between this determination to prevent the award to Petitioner (which would have brought this case directly under the *Purcell Envelope* case) except the decision of the Comptroller General. Therefore, the attempted distinction of the *Purcell Envelope* case made by respondent has no merit and falls.

The Court of Claims in *Heyer Products Co., Inc.* v. *United States*, 135 Ct. Cls. 63 (1956), limited those instances when a bidder for a government contract who did not obtain the contract had rights against the government, to instances where a bid rejection was "fraudulent . . . arbitrary . . . capricious [or] so unreasonable as to necessarily imply bad faith."

We submit that this decision was consistent with Petitioner's position that an otherwise successful bidder, who loses a government contract because of a misinterpretation of law, should be made whole. An action of an administrative official which is arbitrary or capricious amounts to an action which transcends the area of discretion and therefore violates the law.

Respondent urged in the Court below and no doubt will urge here, that since the contract in question was refused to Petitioner on the "merely" erroneous decision of the Comptroller General, the standards of the *Heyer* case have not been met here; by resting its decision upon the *Heyer* case, the Court of Claims apparently agreed with Respondent.

The Comptroller General decided that *as a matter of law* the contract in question could not be awarded to Petitioner. If this decision is erroneous (which must be admitted here, as the Court of Claims did not decide to the contrary) then Petitioner's bid has been arbitrarily rejected. In deciding questions of law there is no area of discretion. A wrong decision on a question of law inflicts a wrong, even though honestly made. While a bidder upon a government contract knowingly assumes the risk that, despite its low bid, it may not receive the contract because of an honest exercise of administrative discretion as to the best advantage to the government, it does not and should not be obliged to accept the loss of a contract solely on account of an unreviewed error of law by an administrative official. Both the *Heyer* and *Purcell Envelope* cases stand for this proposition.

Respondent urged below that since *Armed Services Procurement Regulations Section 2-407.9* required the submission of a protested award to the Comptroller General, the decision of the Comptroller General amounted to an exercise of discretion by the Government. *We point out that matters are submitted to the Comptroller General for determinations of legal questions and not for an exercise of administrative discretion.* Petitioner's legal rights accrued when the Contracting Officer recommended an award to it. The action of the Comptroller General in this case is no different from a case where an erroneous legal decision had been made *after* award and the contract therefore not given to Petitioner. The decision of the Comptroller General is a decision *of law* affecting pre-existing rights.

2. Decisions of the Comptroller General Are Reviewable.

> "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.[1] . . ."

This Court has held in *Miguel v. McCarl*, 291 U. S. 442 that an erroneous opinion of the Comptroller General does not affect a duty plainly imposed upon an administrative officer. Having determined that Petitioner's bid was most advantageous to the government, we submit that the Contracting Officer in the instant case had a plain duty to award the contract to Petitioner. Petitioner should not be prejudiced by the Contracting Officer's failure to perform such duty in reliance solely upon an erroneous decision of law of the Comptroller General.

The Administrative Procedure Act specifically provides for judicial review of all determinations by executive officials which are not discretionary decisions.

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[1] Jaffee, *The Right to Judicial Review I*, 71 Harvard Law Review 401.

It provides at 5 U. S. C. A. 1009:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.
>
> (a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof."

Similarly the philosophy of Congress that questions of law determined by executive officials should be subject to judicial review is indicated in the so-called Wunderlich Act (41 U. S. C. 322) providing that

> "no government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board."

The decision of the Court of Claims violates the foregoing principles of reviewability.

3. It Is to the Benefit of the Government That Bidders on Public Contracts Not Be Prejudiced by Erroneous Determinations of Law.

Perkins v. *Lukens Steel Co.*, 310 U. S. 113 has been cited by Respondent below to the effect that Petitioner was a mere "prospective bidder," and that the public bidding statutes are not for its benefit. It is for the benefit of *the public* that prospective bidders have the assurance that if their's is the best bid in all respects, in the opinion of the contracting officer, they will get the contract. Only thus will the public retain the advantage of receiving honest, spirited and competitive bidding upon supplies and services needed.

Petitioner does not pray in this action for the *benefit* of the contract involved, although in *United States* v. *Purcell Envelope Co.*, supra, the contractor was awarded the difference between the contract price and what performance

of the contract would have cost it. Petitioner here merely asks to be made whole as to its expenses involved in preparing and submitting a bid—which we submit as a matter of law, should have been the successful bid. We urge this Court that the government's reputation for fair dealing owes to bidders on its contracts that, in the face of an error of law as existed here, the aggrieved bidder be put at least in the position he was *before* he began relying on the implication in the invitation for bids that bids would be acted upon free from legal error.

4. The Comptroller General's Decision Was Patently Erroneous.

Although the Court of Claims did not reach the point of deciding whether or not the Comptroller's decision was correct, we believe that this Court should be satisfied that there is merit to Petitioner's claim that it was erroneous.

Paragraph X-2 of the Invitation to Bid (Exhibit 2, transcript) provided:

> "*The bid will not be rejected* if the bidder has previously offered a product which has been previously procured so that additional descriptive literature would not add to the Government's knowledge of the acceptability of the product. The Contracting Officer will verify that the product previously procured id (sic) adequate to meet the requirements of this Invitation for Bids. Upon verification, the requirement for furnishing descriptive literature may be waived as to that bidder."

Thus Petitioner was entitled *not to have its bid rejected* on descriptive literature grounds if the Contracting Officer determined that it had previously supplied a product to the Government within the purport of the above paragraph. The Contracting Officer waived the descriptive literature requirement as to Petitioner based on just such a finding.

Nevertheless, the Comptroller General determined that Petitioner could not be awarded the contract as a matter of law because of a defect in descriptive literature submitted by Petitioner.

CONCLUSION

We submit that it is in the interest of justice, and of upholding the integrity of the United States Government in its business dealings that Petitioner and contractors who may stand in its shoes in the future, not be allowed to suffer on account of an erroneous decision of the Comptroller General. This Court should grant certiorari here in order to clarify to potential bidders on government contracts the area of their rights in the event the exercise of an administrative discretion in their favor is nullified by a subsequent decision erroneous in law.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December —, 1960.

APPENDIX A

10 U. S. C. 2305. Formal advertisements for bids; time; opening; award; rejection

"(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action. Aug. 10, 1956, c. 1041, 70A Stat. 130; Sept. 2, 1958, Pub. L. 85-861, § 1 (44), 72 Stat. 1457."

APPENDIX B

Order of the Court of Claims on defendant's motion for summary judgment.

ORDER

This case comes before the court on defendant's motion, filed March 31, 1959, for summary judgment and plaintiff's opposition thereto. Upon consideration thereof, together with oral argument by counsel and based upon *Heyer Products* v. *United States*, 135 Ct. Cl., 63.

IT IS ORDERED this eighteenth day of March, 1960, that defendant's motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

/s/ MARVIN JONES
MARVIN JONES
Chief Judge